IN THE MICHIGAN SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Griffin, P.J., and Meter, and Kelly, J.J.)

SHARDA GARG,	Supreme Court No.: 121361 & (64)
Plaintiff/Appellee/ Cross-Appellant,	Court of Appeals No.: 223829
vs.	
MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY,	Macomb County Circuit Court No.: 95-3319 CK
Defendant-Appellant/ Cross-Appellee.	

BRIEF FOR PLAINTIFF-APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING JURISDICTION

The statement regarding jurisdiction in Defendant-Appellant's Brief is correct and complete.

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER EVIDENCE EXISTED IN THE RECORD FROM WHICH A REASONABLE JURY COULD FIND THAT DEFENDANT RETALIATED AGAINST PLAINTIFF BECAUSE SHE OPPOSED VIOLATIONS OF ELLIOT-LARSEN.

Plaintiff-Appellee Answer:	Yes
Trial Court Answer:	Did not answer
Court of Appeals Answer:	Yes
Defendant-Appellant Answer:	No

II

WHETHER DEFENDANT'S FAILURE TO SPECIFICALLY OBJECT TO THE PORTION OF THE VERDICT FORM CONCERNING RETALIATION PRECLUDES APPELLATE REVIEW.

Plaintiff-Appellee Answer:	Yes
Trial Court Answer:	Did not answer
Court of Appeals Answer:	Did not answer
Defendant-Appellant Answer:	No

III

WHETHER THE CONTINUING VIOLATIONS DOCTRINE OF *SUMNER V GOODYEAR*, 42 MICH 505 (1986) SHOULD BE MODIFIED OR ABROGATED AND A NEW TRIAL BE GRANTED TO DEFENDANT-APPELLANT.

Plaintiff-Appellee Answer:	No
Trial Court Answer:	No
Court of Appeals Answer:	No
Defendant-Appellant Answer:	Yes

STATEMENT OF FACTS

This case arises out of the employment of the Plaintiff-Appellee, Sharda Garg, by the Defendant- Appellant, Macomb County Community Mental Health Services. Garg had been employed by the Defendant as a Staff-Psychologist - Therapist II since 1978.[1] While employed there, Garg twice opposed what she in good faith believed to be Defendants' discriminatory conduct. In response, Garg was subjected to a pattern and practice of retaliation which included the denial of many promotions for which she was qualified and the creation of hostile working conditions through disparate treatment to which she was unfairly subjected.

After realizing that these acts were neither mere coincidence nor discrete petty annoyances, Plaintiff filed a judicial complaint on July 21, 1995 in which she alleged discrimination on the basis of national origin/color and retaliation for her opposition to the discriminatory conduct of the Defendant. Trial of this matter was conducted in April 1998 and resulted in a verdict on the retaliation claim and a damage award of $250,000 for Ms. Garg. Defendant appealed. This appeal followed the entry of judgment by Judge Olzark on August 17, 1998 in favor of Ms. Garg in the amount of $354,298.17 on the claim of retaliation under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq* and affirmance of that judgment by the Court of Appeals on March 29, 2002.

PROCEDURAL HISTORY

Sharda Garg commenced this action on July 21, 1995 in Macomb County Circuit Court. In her three count complaint, Garg alleged that she had been denied promotions on the basis of her

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[1] Garg was employed by the Defendant throughout the trial, but retired during the appellate proceedings.

national origin and color in violation of Elliott-Larsen and in retaliation for opposing discrimination by filing a grievance in 1987 and notifying Defendant of Plaintiff's claims in 1994 (Complaint, para 24, 26, Apx 4a-10a).

During discovery, Garg filed a motion to amend her complaint to allege an additional incident of protected activity for which Defendant retaliated against her. Specifically, Garg sought to add a single phrase[2] to one paragraph of the retaliation count, not a new theory or cause of action. As Judge Montgomery summarized Plaintiff's position:

> Plaintiff argues, in her motion to amend complaint, that the Court should permit her to amend her complaint because she recently became aware that the source of the retaliatory employment action against her by defendants arises from a 1981 incident wherein plaintiff was forced to use physical force to resist unwanted sexual advances from her supervisor. Since plaintiff does not seek to add a new claim to her complaint; but merely wishes to add an additional factual basis to the existing retaliation claim, plaintiff asserts there will be no undue prejudice to defendants.

(Order denying partial summary disposition, p 5, Apx 15a). Arguing only that the amendment would be futile and untimely, Defendant opposed leave to amend. The Defendant never suggested that Garg was stating a new theory or claim (*Id*, pp 5-6, Apx 15a-16a). After hearing argument, the trial court allowed Garg to amend her complaint. (*Id*, p 10, Apx 20a).

Consistent with her position in the motion, Garg filed a first amended complaint on March 11, 1996 which did not assert a new count or theory but simply added a few words to a single paragraph alleging the additional protected activity in which Garg engaged by opposing the sexual harassment of her supervisor, Donald Habkirk. (First Amended Complaint, ¶ 41, Apx 26a).

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[2] The only words added to Plaintiff's complaint by the amendment were "and because she rejected the sexual overture of her supervisor.." in paragraph 41.

Twice Defendant sought summary disposition in the trial court. The first motion for partial summary disposition was denied on July 10, 1996.[3] Defendant unsuccessfully applied for interlocutory appeal of that decision. After the denial of the second motion for summary disposition on April 30, 1997, the case proceeded to trial.

Trial commenced with jury selection on March 27, 1998. After a lengthy trial, the jury returned a verdict for plaintiff on her retaliation claim and awarded her $250,000.00.[4] As part of its deliberations, the jury completed the verdict form which had been prepared by the court and used without objection by plaintiff or defendant. The Defendant did submit a longer verdict form which was revised by the court. However, the only objection by the Defendant to the shorter form was that it did not break damages down between economic and non-economic damages. Defendant did not object to the portion of the verdict form that dealt with the retaliation claim (Tr. 4/22 p10-12, Apx 164b).

The verdict form asked the jury to resolve the following question: "Was the plaintiff discriminated against because she opposed sexual harassment or because she filed a charge or complaint about being discriminated against?"[5] (Verdict form, Apx 247a). Having answered that question in the affirmative, the jury assessed Garg's damages at $250,000.00.(*Id*).

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[3] In this motion, Defendant unsuccessfully argued that all claims of discrimination and retaliation for incidents which occurred prior to July 21, 1992, i.e. were barred by the statute of limitations. Applying the continuing violations doctrine, the Court denied Defendant's motion.(Apx 14a)

[4] The jury found that Plaintiff was not discriminated against on the basis of her national origin or color. Plaintiff did not appeal that verdict so those claims are not subject to this appeal.

[5] The Defendant's description of the verdict form contained on page three of its brief is misleading. The court only described the type of protected activity and did not delineate the dates on which those activities occurred.

The trial court subsequently entered judgment on the verdict. Defendant filed motions for judgment notwithstanding the verdict, remittitur and new trial. The trial court which had been able to observe the witnesses presented throughout the trial carefully considered the Defendant's post-trial motions. In fact, the court required the parties to order and provide citations to the transcript. After reviewing the record, the trial court concluded plaintiff presented sufficient evidence to support her retaliation claim. (Opinion and Order dated 11/3/99, pp 9-10, Apx 256a).

Defendant then filed a claim of appeal. After briefing and oral argument, the Court of Appeals affirmed the judgment in all respects. The court addressed each of Plaintiff's allegations of illegal retaliation including that she was retaliated against for slugging her supervisor, Habkirk, in opposition to sexual harassment in 1981 and that she was retaliated against for her 1987 action of filing a racial discrimination grievance against another supervisor, Kent Cathcart. With regard to the slugging incident, the Court of Appeals concluded that based on the record, Garg established a jury question with evidence supporting his findings including:

> 1) she had observed Habkirk pulling an employee's bra strap while walking behind her and pulling an employee's underwear elastic while seated behind her 2) around the same time in 1981, Plaintiff was walking along the hallway when she felt someone touching her back; 3) she turned around and swung at this person; 4) the person was Habkirk, one of her supervisors; 5) after the slugging incident, Habkirk became cold toward her; 6) a co-worker told her that Habkirk did not like her;7) Plaintiff did not receive the first available promotion, in 1983, after the slugging incident, despite being qualified for the position; 8) Plaintiff was denied eighteen total promotions between 1983 and 1997, despite being qualified for the positions; 9) individuals less qualified than Plaintiff received promotions while Plaintiff did not; and 10) Habkirk remained in her chain of command throughout the years. (Court of Appeals Opinion, Apx 267a).

The court concluded that reasonable jurors could differ with regard to whether Plaintiff sufficiently

established the elements of a retaliation claim and therefore found that the motions for directed verdict and JNOV were properly denied. (*Id*, Apx 268a).

The Court of Appeals also found that evidence existed from which a jury could reasonably have concluded that Garg suffered retaliation because she filed a grievance with Defendant alleging denial of promotions based on her national origin. Evidence identified by the Court of Appeals included:

> 1) Plaintiff filed a grievance alleging racial discrimination in June 1987; 2) Cathcart, a supervisor, knew about the grievance; 3) after filing the grievance, Plaintiff failed to receive the next promotion that she sought, posted in December 1988, despite being qualified for the position; 4) Plaintiff failed to receive seven total promotions between 1989 and 1997, despite being qualified for the positions; 5) individuals less qualified than Plaintiffs received promotions which Plaintiff did not; 6) in 1994 Plaintiff was transferred to a windowless office from which she could hear noises emanating from the adjacent bathroom, while persons more [sic] senior to Plaintiff received better offices; in 1996, Cathcart made a statement disparaging to blacks; 8) Cathcart made another comment disparaging to Indians; 9) Cathcart reprimanded Plaintiff but not others for minor infractions; 10) Cathcart ignored Plaintiff in staff meetings and treated her poorly in the hallways; 11) in 1984 and 1985, Cathcart used the word "n----" in referring to blacks and 12) Cathcart remained in Plaintiff's chain of command throughout the years. (*Id*, 268a)

Again the court found this evidence sufficient to support the jury verdict and affirmed the trial court's denial of the motions for directed verdict and jnov.(*Id*, p 268a)

In addition, the Court of Appeals concluded that the continuing violation doctrine was applicable to Plaintiff's claims. Plaintiff established that she was subjected to a "series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern." Therefore, Plaintiff was entitled to bring her claims for retaliation arising from the denial of positions which had occurred more than three years before the lawsuit was filed. (*Id*, pp 3-4, Apx 268a-269a).

Defendant filed an application for leave to appeal with this Court. On March 11, 2004, the Court heard oral argument on the application. Subsequently, this Court granted leave to appeal and directed that the issues to be briefed include:

> (1) Whether plaintiff established a prima facie case regarding either of her two theories of retaliation, 2) whether a new trial is required because one of the theories submitted to the jury was unsupported by the proofs, (3) whether the continuing violations doctrine should be preserved, modified or abrogated in light of the language of the statute of limitations, MCL 600.5805(1) and the United States Supreme Court decision in Natl Passenger Corp v Morgan 536 US 101 (2002) and 4) whether plaintiff received an award of future damages within the meaning of MCL 600.6013(1), thus barring prejudgment interest on that amount.(Apx 273a).

In accordance with the Court's direction, Plaintiff files this brief.

FACTUAL BACKGROUND

The Plaintiff, Sharda Garg, is an Asian Indian, British educated and trained as a psychologist in India. (Tr 4/1/98, pp 55, 57-9, Apx1b). By the time she came to the United States, Garg had completed her Master's degree in psychology and all course work for her PhD.(*Id* p59, Apx 4b) Once she emigrated from India, Plaintiff held several positions in which she was able to develop a broad range of experience. She conducted testing and provided therapy to all types of patients, adults and children, including those with mental illness or developmental disabilities for Jewish Vocational Services in Montreal . In this position, Ms. Garg also supervised graduate students (*Id*, pp 64-5, Apx 6-7b; *Id,* 68, Apx 43a). Plaintiff later worked at Howard University where she tested and counseled students at the medical school. (*Id*, 70, Apx 8b).

In August 1978, following her family's relocation to Michigan, Plaintiff applied for a position with the Defendant.(*Id*, p 76, Apx 12b). After interviewing with Robert Slaine, Ms. Garg

was hired as a Staff Psychologist -Therapist II at Defendant's Life Consultation Center (LCC). (*Id*, 73,76, Apx 9b, 12b) At the time, she was the only person of color in the facility. (*Id*, 105, Apx 20b) The LCC worked primarily with developmentally disabled individuals.(*Id*, p 74, Apx 10b) However, they also treated mentally ill clients.(Tr 4/2, p 31, Apx 65b)

Plaintiff's duties entailed diagnostic testing, counseling, staff consultation and completion of statistics and other paperwork required by the Department of Mental Health. (*Id*, p 77, Apx 45b) From the start, Defendant found Garg's performance to be excellent. On her performance reviews, she received ratings of either outstanding or very good through 1983.[6] (Plaintiff's Exh 54-66).

Initially, Garg reported to Robert Slaine, with whom she had a good working relationship.(*Id*, p 98, Apx 96b)[7] Beginning in 1980, Slaine's supervisor was Donald Habkirk, the Program Director.(*Id*, p 121-2, Apx 97b) Garg had observed Habkirk engage in inappropriate conduct with his female subordinates. He had snapped one woman's bra and grabbed another woman's underwear from behind.[8] (*Id*, 122, Apx 98b) The women in the group shared their distaste for Habkirk's inappropriate behavior (*Id*, 123, Apx 99b; D. Slaine p. 513, Apx 139b) Slaine even met with the women who worked in LCC to discuss Habkirk's behavior. (*Id*, 124, Apx 100b) When, following a meeting, Habkirk attempted to touch Garg from behind, she slugged him.(*Id*, 126, Apx 27b; 241,

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[6] In May 1983, Plaintiff received her first evaluation with a satisfactory rating. She challenged this low score. Curiously, this downgraded evaluation signed by Habkirk and Slaine occurred just as the first promotion was becoming available at LCC. (*Id* 117, Apx 22b)

[7] Although Defendant refers to Slaine as Plaintiff's personal friend in its brief, Slaine admitted that he and Plaintiff were not friends, specifically because of this lawsuit. (Tr p 318, Apx 129b).

[8] Defendant claims that Ms. Slaine denied she had been sexually harassed. (Defendant's Brief, p 8). Slaine, however, did admit that Habkirk had pulled her underwear and that she found his behavior to be inappropriate and childish. (Tr p 510, Apx 138b).

Apx 119b) Garg believed that it was Habkirk touching her when she reflexively slugged him (Tr 241, Apx 119b). She thus opposed his violation of Elliott-Larsen's prohibition against sexual harassment. Although Garg and Habkirk had previously enjoyed a cordial relationship, he became cold and distant toward her after this incident.(Tr p 122,132, Apx 58a).

As soon as a chance arose, Habkirk retaliated against Garg. In 1983, several promotional opportunities became available. The first position was a Developmental Disability Outpatient Therapist III.[9] Just before that position was officially posted, Garg's performance was downgraded to satisfactory.(Exh 65; *Id*114, Apx 21b) Plaintiff applied[10] and although she met all the requirements of the posting, she did not get the promotion.(Exhs 2, 3) Instead Defendant hired Joanne Bielenin, a candidate from outside the organization, violating its policy to promote from within the organization when there is a qualified candidate.(*Id*, 149, 151, Apx 35b, 37b) Unlike Plaintiff, Bielenin had no prior experience with a developmentally disabled population and had not worked at LCC. In addition, Bielenin had only three months supervisory experience for a position which required a year of experience (Exh 2).Garg had all these qualifications as she had worked with developmentally disabled clients at LCC for several years. Moreover, she trained and provided assistance to employees at LCC and had supervised master degree students in her prior positions.(Tr 4/1 pp 149-151, Apx 35, 36, 37b)

A position for Epilepsy Coordinator also became available in September 1983. This position entailed working with children support services, presenting cases to MORC for admission to their

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[9] Levels are assigned to the therapist position. Thus a therapist III is a higher position than the therapist II position into which Plaintiff was hired.

[10] The application was sent to Mr. Habkirk as well as others managers of the Defendant (Exh 3)

facility and serving as a liaison between LCC and the Epilepsy Center of Michigan. Again Garg applied and despite meeting all the qualifications for the position, she was not hired.[11] Instead the interview team which included Habkirk hired Dan Montiy who had been employed by another agency.(*Id*, pp154-5, Apx 38, 39b) In addition, Montiy did not have the required experience with a developmentally disabled population. (*Id*).

The third position available that year which Plaintiff sought was Family Support Coordinator. Although this would have been a lateral transfer, Plaintiff felt the position would have provided her with additional and broader experience.(Tr 4/1, p 160, Apx 42b) Instead of hiring her, Defendants hired Debbie Milhouse. She, however, did not meet the minimum requirements for the job, specifically therapeutic counseling experience which was wholly lacking on Milhouse's resume. (*Id*, pp 159, 166, Apx 41-47b; Slaine TR p 422-3, Apx 136b; Exh 6, 7, 343). On the other hand, Plaintiff met all requirements for the job as she had a master's degree and two years experience in direct child family therapeutic counseling (Tr 4/1, p 166, Apx 47b)This pattern continued as Garg was denied several more positions during 1984 - 1987. (Tr 4/1, pp 151-54, Apx 37-38b; Tr 4/2 pp 14-5, Apx 49-50b, 17- 24, Apx 52-59b)

Throughout this time, Habkirk remained Plaintiff's ultimate supervisor in the chain of command and thus was able to impact her attempts to move into new positions. (Tr 4/2 p16, Apx 51b; 4/1 pp 159-161, Apx 41-43b;Garg Tr 672, 676, Apx 140-141b). He received copies of her applications, participated in some of the interviews and as Director gave final approval to all promotional decisions.(Tr 4/1 p 158, Apx 40b; 4/2 p 16, 21-2, 24, Apx 51b, 61b, 56-57b ; *Id* 160,

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[11] Although Defendant claims that Plaintiff withdrew her application for this position, she recalled interviewing with Habkirk for the job. (Tr 4/1 157, Tr 257)

Apx 108b; pp 260-1, Apx 121b, pp 263-5,122b)[12] Thus the proofs supported the jury's conclusion that Garg's forceful resistance to Habkirk's behavior was not forgotten. Although Habkirk admitted that Garg was a good employee, she received no promotion over the next fifteen years and was the only therapist who failed to obtain a single promotion during their tenure at the LCC facility. (See e.g. 4/1 p 151, 154, Apx 37-38b ; 4/2 pp 14-20, Apx 49-55b; 23-5, Apx 58-60b; 27-8, Apx 27-28b; 30-37, Apx 64-71b; 40-45, Apx 72-77b; 51-55, Apx 78-82b; 61, Apx 83b;137, Apx 103b; 156, Apx 104b; 265-6, Apx 122-123b) Frustrated, Plaintiff's husband asked Robert Slaine why Plaintiff was not being promoted. Slaine replied that Habkirk did not like her. (Tr 4/1 pp 133-4, Apx 29b).

Kent Cathcart became Garg's supervisor in 1986 when he was selected by Habkirk to be the Program Director.(Tr 1092, Apx 156b). He was not new to the organization. During his employment, Cathcart had demonstrated a predisposition against people of color. Witnesses testified that he made disparaging remarks about Indians and African-Americans. When he learned that Garg's son had been accepted to medical school, rather than congratulate her, he exclaimed that there are enough Indian doctors already.(4/2 Tr 96-7, Apx 94-95b) He also complained to group of employees about the accent of an Indian psychiatrist, stating that "these people have been here long enough, they ought to speak good English." (Hurst, Tr p. 847, Apx 144b) Cathcart also stated that he would not have hired Jan Hurst, an African-American nurse, if there was a white candidate available. (T272, Apx 124b).He also used the term "nigger" to refer to African-Americans. (T871-3, Apx 147-149b).

Conditions for Plaintiff did not improve under Cathcart. Although she applied for several

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[12] Habkirk tried to deny that he participated in interviews but had to admit he was there when confronted with the contemporaneous documents. (Tr 1268-1270, Apx 159-161b)

transfers and promotions, she did not receive any of those positions. In December 1986, Garg applied for a position as DD Partial Day Therapist III. (Exhs 27-29). Instead of hiring Plaintiff, Defendant gave the job to Teri Hibbard who was a contract employee with much less seniority than Garg. Shortly thereafter, another Therapist III position was posted, this time for a DD Outpatient Therapist III. Garg sent her application for the position to Cathcart and Habkirk. Plaintiff was highly qualified for this position. She had worked with the DD population for her entire tenure with Defendant. The only new responsibility would have been direct supervision of the staff. This would not have been difficult. Ms. Garg knew the staff as she had worked closely with them for many years. Despite Garg's qualifications, the Defendant hired Margaret Porkka from outside the company. (Tr 4/2 p23, Apx 58b). She had no experience in outpatient care or testing.

Shocked that she did not receive this position, Garg filed an union grievance in June 1987, alleging that she was being denied promotions on the basis of her national origin or color.[13] (Exh 113) The grievance, which was presented to Cathcart, was denied. (4/2 75-6,78, Apx 87-88b, Apx 90b). Without any investigation, Slaine concluded that there was no discrimination. (Slaine, Tr 370, 396). Garg persevered and applied for the next promotional opportunity which was available in December 1988. Although she was well qualified for this DD Outpatient Therapist III position, she was not selected for the position.(Exhs 34-6; 4/2 pp 24-6, Apx 59-61b).

Over the next several years, Garg continued to apply for promotions and lateral transfers and was continually rejected. In August 1994, she wrote to Habkirk, requesting an investigation into why

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[13]Garg had filed two earlier grievances alleging breaches of the bargaining agreement - one in 1985 because she was performing two jobs including responsibilities not included in her job description and one in 1987 when she was denied a promotion which was given to a non-seniority contract employee. (Exhs 105, 110).

she had not been promoted. (Tr 244, Apx 120b; T 4/2 68-8, Apx 84-85b; T 74-5, Apx 86-87b; Exh 141). No investigation was conducted and Plaintiff never received a response to her inquiry regarding the repeated denials of promotions (Tr 252, Apx 121b) Shortly thereafter, her attorney wrote to Defendant asserting claims of national origin discrimination and retaliation.(Tr 4/2, p 68-9, Apx 84-85b) Despite her efforts, Garg was denied seven more promotions between her 1987 grievance and the filing of her lawsuit in 1995. This did not end the retaliation. Defendant continued to deny Ms. Garg positions in favor of less qualified candidates even after the litigation commenced.

From 1983 on, Garg repeatedly sought to advance within the organization but her attempts were repeatedly thwarted. Plaintiff testified at length about the many promotions she sought but did not receive after she opposed sexual harassment by her boss and complained that she was being discriminated against on the basis of national origin/color. (Tr 4/1 93-96, Apx15-18b; 136-8, Apx 31-33b; 150-1, Apx 36-37b; Tr 4/2, 14-20, Apx 49-55b; 23-25, Apx 60-61b; 27-28, Apx 62-63b; 30-37, Apx 64-71b; 40-45, Apx 77b; 51-55,61, Apx 78-82, 83b; 137, Apx 103b; 265-6, Apx 122-123b). Evidence at trial demonstrated that defendant eased or waived the formal qualifications for positions for certain applicants but not Plaintiff in violation of its own policies[14] (Tr , 865, 898, Axp 146, 152b); that Ms. Garg was not asked the same questions at interviews as other applicants (Tr 4/2, 77, 91, Apx 13, 14b); that the Defendant's standard practice was to promote from within, but positions Garg sought were given to new hires from outside the organization (Tr 4/1 50-1, Apx 36b; 154-5, Apx 38-39b; T 4/2, 23, Apx 57b38b); and that the selection of candidates for promotion was

[14] Defendant's policy required the position to be re-posted if the minimum qualifications were changed or relaxed.(Griggs, Tr pp 987-8, Apx 153-154b) Otherwise candidates who did not meet the minimum requirements were not eligible for the position (Slaine, Tr 376, Apx 133b)

done on a subjective basis. [15] (Demery Tr 697, Apx 142b)For example, the union contract stated that promotions were given precedence over lateral transfers. Yet Kathy Andreweles were laterally transferred to a position which would have represented a promotion for another employee. (Tr 305-6, 345, Apx 127-128, 131b)

In addition to denying her promotions, Defendant treated Ms. Garg in a degrading and humiliating manner which, combined with the repeated denials of promotions, created a hostile work environment. Cathcart would criticize Ms. Garg for not participating in agency activities but then deny her requests to participate in events, meetings, conferences and on committees.(4/1 Tr 90, Apx 14b). For example Plaintiff introduced evidence that she requested inclusion on a committee composed of staff psychologists in 1988 when she discovered that it existed and had only white, male members. (Tr 4/2, p 84, Apx 91b). After Plaintiff's letter, Defendant placed a woman on the committee who unlike Ms. Garg was neither a staff psychologist nor an expert in testing . Garg was also denied the opportunity to attend conferences by Terry Falasa, her supervisor from July 1994 until November 1995. (Tr 4/2, p 91, Apx 91b(1)).

Cathcart also treated Ms. Garg less favorably than her co-workers. He would reprimand her in the presence of other employees if she was two minutes late to work, but allow others to arrive whenever they wanted without criticism. (Tr 4/2, p 94, Apx 92b). When all the employees would

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[15] In fact, Defendant would promote other employees to a Therapist III position simply by reclassifying the position so that the employee did not even have to compete for the job, nor could others apply for the reclassified job. (4/1 Tr, 144, Apx 34b). For example in 1988, Debbie Milhouse-Slaine was reclassified from a therapist II to a III. Plaintiff was qualified for the position but not given the opportunity to compete for the job. (Tr 4/2/ T179-180, Apx 112b-113b). Similarly, Mr. Miller, who was Plaintiff's supervisor when she was transferred to First North, had been reclassified from a Therapist II to a III in October 1995 just prior to Plaintiff's transfer (Tr 180, 183, Apx 113b, 114b; Slaine Tr 396-7, Apx 134-135b).

congregate at the door a few minutes before time to leave, Cathcart would criticize only Plaintiff. (*Id*, p 95, Apx 93b) Carthcart also chastised Ms. Garg for going outside to observe a rainbow while others were permitted to go outside to smoke on company time.(Tr p.97, Apx 95b, 760, Apx 107b). In addition, Garg's coworkers were allowed to make and eat snacks at work while she was reprimanded for eating at her desk.(Tr 97, Apx 95b; T760, Apx 143b) Cathcart even refused to give Ms. Garg a key to the facility so that she was often forced to wait outside in the cold when she was first to arrive. (Tr 291-2, Apx 125-126b). When Ms. Garg would present a case in staff meetings, Cathcart would be unreasonably critical or totally ignore her. Other people were not subjected to this type of scrutiny. (Tr 134, Apx 102b). [16]

The degradation to which she was subjected increased when she was transferred to a different facility in late 1995. When LCC was dissolved, Ms. Garg was reassigned to a facility known as First North.(Tr 4/2, 61, Apx 83b). Although she had more seniority than anyone else in the facility, Plaintiff was assigned an office which had been a former storage room, without carpeting and windows. (Tr Garg, pp186-7, Apx 115-116b) More troubling than the physical condition of this workspace was its location. The storage area was next to the bathroom . Even her supervisor who assigned her to that office testified that "you could hear people defecating and people urinating." as well as "exploding bowels." (Tr1139, Apx 157b). Plaintiff was forced to meet with clients in this room. (Tr 187, Apx 116)

There was no legitimate reason that Plaintiff was given this room as an office. At the time there were several vacant offices, contract employees had offices, and one employee, Terry Falasa,

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[16] The harassment continued even at First North. Her new supervisor, Tom Miller, in addition to the disgusting office, also started sending memos to Plaintiff unfairly attacking her performance. Sometimes she got up to four memos in one day. (Tr Garg, p 205, 118b)

even had two offices.(Tr 188, Apx 117b) Yet Defendants assigned Ms. Garg to this space and refused to move her despite the availability of more comfortable work areas. Plaintiff remained in this office for more than a year well after this litigation was filed and the testimony about exploding bowels were provided. (Tr 1138, 1140, Apx 157b, 158b).

SUMMARY OF ARGUMENT

Sufficient evidence exists in the record to establish that the Defendant retaliated against the Plaintiff for engaging in protected activities. Plaintiff presented evidence during trial from which the jury could reasonably conclude that she was subjected to illegal retaliation for opposing sexual harassment and national origin discrimination. Plaintiff engaged in multiple protected activities. In 1981, she opposed the sexual harassing behavior of Donald Habkirk, a supervisor, who had engaged in inappropriate sexual antics with women in the office by snapping bras and tugging on underwear. When he approached Plaintiff, she slugged him in opposition to his sexually hostile behavior. Then in 1987, Plaintiff filed a grievance alleging that she had been denied promotions based on her national origin. Subsequently, on her own and through her attorneys, Plaintiff sought an explanation for the lack of promotion and accused Defendant of national origin discrimination.

The evidence demonstrates that the retaliation started almost immediately after Plaintiff rebuked Mr. Habkirk for his sexually inappropriate behavior. He immediately changed from cordial to cold towards Plaintiff. Then her performance was downgraded shortly before a promotional opportunity became available. Then, she was denied that position in favor of an individual hired from the outside who was less qualified for the job than the Plaintiff. A pattern developed as Plaintiff was denied each promotion and lateral transfer opportunity she sought. Despite the defeats, Plaintiff persisted seeking 11 opportunities between 1983 and 1987.

Throughout this time, Donald Habkirk was in the supervisory chain of command and often interviewed Plaintiff for the position. In 1986, Habkirk promoted Kent Cathcart to Director of LCC. Cathcart had a predisposition against people of color which he freely expressed to other employees. Cathcart then denied Plaintiff two additional promotions.

After she filed a grievance, the retaliation worsened. She was now subjected to a daily barrage of harassment in the form of unwarranted attacks on her performance and work habits, disparate treatment, denial of opportunities to attend conferences and sit on committees, and placement in a windowless storage closet adjacent to the bathroom as an office. This pattern continued through trial. Thus, sufficient evidence existed from which the jury properly returned a verdict for Plaintiff on her retaliation claim.

Since Plaintiff alleged only a single count of retaliation, the verdict form prepared by the court was proper. Further, Defendant failed to object to that portion of the form as it has waived all objections.

Finally, all Plaintiff's claims were properly before the court. None are saved by the statute of limitations. Nor does there exist any legitimate reason to modify current, long-standing Michigan law which adopted the continuing violations doctrine in *Sumner v Goodyear Tire and Rubber Co,* 427 Mich 505 (1986).

STANDARD OF REVIEW

The standard of review for denial of a motion for directed verdict and for judgment not withstanding the verdict are essentially the same. The court must consider all the evidence and all reasonable inferences to be drawn from that evidence in the light most favorable to the plaintiff. *Orzel v Scott Drug Co.* 449 Mich 550, 557 (1995). Whenever a fact question exists, upon which

reasonable minds may differ, the trial judge may not direct a verdict because the "jury, not the trial judge, is the trier of fact." *Caldwell v Fox,* 394 Mich 401, 407 (1975). This Court has always followed the view of Chief Justice Cooley who stated in *Detroit & Milwaukee R Co v Van Steinburg,* 17 Mich 99, 117 (1868):

> In determining this question, we must look at the case as it appears from the plaintiff's own testimony, unqualified by any which was offered on the part of the defendants and must concede to him any thing which he could fairly claim upon that evidence. He had a right to ask the jury to believe the case as he presented it; and however improbable some portions of his testimony may appear to us, we cannot say that the jury might not have given it full credence. It is for them, and not for the court to compare and weigh the evidence.

"Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Wilkinson v Lee* 463 Mich 388, 391 (2000). If the evidence is such that reasonable jurors could have found for the plaintiff, the trial court may not substitute its judgment for that of the jury. *McLemore v Detroit Receiving Hospital,* 196 Mich App 391, 395 (1992).

The appellate court's function "is to determine whether the trial court abused its discretion in ruling on a new trial, giving substantial deference to the conclusion of a trial court that a verdict was not against the great weight of the evidence. *Severn v Sperry Corp*, 212 Mich app 406, 412 (1995).

> The hurdle a judge must clear to overrule a jury is unquestionably among the highest in our law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation. *People v Bart* (on remand), 220 Mich App 1, 12-13 (1996).

In this case, there is not justification for overruling the jury. There is no evidence that the jurors was not "reasonable". Voir dire was conducted to assure that the jurors did not hold any

bizarre beliefs and would follow the law as directed by the court. Thus, there is no legitimate basis to ignore or overturn the verdict of the jury.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE PLAINTIFF PRESENTED SUFFICIENT EVIDENCE OF RETALIATION FOR JURY CONSIDERATION.

The Defendant has argued that Ms. Garg failed to establish a prima facie case of retaliation and that the trial court therefore should have granted a directed verdict or JNOV in its favor. This argument should be rejected as Plaintiff presented sufficient evidence upon which reasonable jurors could have reached a verdict for Plaintiff.

The statute provides in pertinent part:

> Two or more persons shall not conspire to, or a person shall not: Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted or participated in an investigation, proceeding or hearing under this act. MCL 37.2701(a).

To establish a prima facie case of retaliation, Plaintiff was required to demonstrate that 1) that she engaged in protected activity; 2) that this was known to the Defendant; 3) that the defendant took an employment action adverse to the plaintiff; and 4) that there was a causal connection between the protected activity and the adverse action. *DeFlaviis v Lord & Taylor, Inc.*, 223 Mich App 432, 436 (1997). The proofs at trial more than adequately met this burden. Plaintiff established that she engaged in two protected activities, both of which were known to the Defendant. As a result, Plaintiff's efforts to advance her career were stonewalled over a period of 15 years and her

previously positive work environment was destroyed.[17]

A. Retaliation for Opposition to Sexual Harassment

The proofs reflect that in the early 1980's Ms. Garg observed Habkirk, when he was supervisor of LCC, sexually harass female employees, by snapping a bra and pulling on another woman's underwear. (4/1, pp 122-3, 130, Apx 24-25b). When Habkirk approached and touched Ms. Garg from behind, she slugged him, forcefully opposing his practice of sexual harassment which included inappropriate touching of women in the workplace. [18] Repelling an unwelcome touching with a physical response constitutes opposition to sexual harassment. [19]

Plaintiff did not verbalize her opposition to the sexual harassment, but, as the trial court noted "certain physical acts can convey a message better than words." (Opinion and Order dated 7/10/96, p 6, Apx 16a). A person can demonstrate opposition to sexual harassment nonverbally such as by slugging the harasser. Thus in *Chamberlain v 101 Realty Inc.,* 915 F2d 777, 784 (1st Cir 1990) employee properly demonstrated her resistance to sexual advances by walking away, changing the subject of the conversation and removing her hands when the harasser grabbed them. Without verbalizing the reason for her conduct, the court concluded that the plaintiff had made it known that

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[17] The essence of Defendant's challenge to the verdict is that if it had sat as the jury, it would have resolved the matter differently. Its view of the evidence is not relevant if as the Court of Appeals correctly found there were evidentiary facts which supported the plaintiff's retaliation claim.

[18] Plaintiff never described Habkirk's behavior as an "innocent tap. "

[19]Defendant has improperly focused on counsel's argument rather than the evidence. Moreover, it has misconstrued Plaintiff's position. As counsel explained did state in her argument, Plaintiff has not stated that Habkirk's actions did not constitute sexual harassment. Rather Plaintiff has argued that Plaintiff's claim is for retaliation, not sexual harassment. Thus she need not prove that Habkirk's actions meet the legal definition of harassment . She need only establish that her actions were in opposition to conduct toward women by Habkirk which she believed to be sexual harassment. (Apx 147a).

the conduct of the harasser was unwelcome. Similarly in *Jones v Wesco Investments, Inc.*, 846 F2d 1154 (8th Cir 1988) the court found that pushing a supervisor away and leaving a room without comment evidences that the sexual inappropriate behavior was unwelcome.

An immediate slap to a harasser is the most direct, indeed a traditional form of opposition to such misconduct. Such opposition falls within the statutory protection of Elliott-Larsen unless it "violates legitimate rules and orders of [the] employer, disrupts the employment environment or interferes with the attainment of [the] employer's goals." *Evans v KC School District,* 65 F3d 98, 102 (8th Cir 1995) citing *Booker v Brown & Williamson Tobacco,* 879 F2d 1304, 1312 (6th Cir 1989). It would hardly be legitimate to expect submission to unwelcome physical conduct or forbid a response from the harassed employee.

In fact, Defendant now admits that physically rebuking a harassed can constitute protected activity for a retaliation claim. However, it argues that Defendant could not have known that Plaintiff was engaged in protected activity when she slapped Habkirk in an immediate response to his inappropriate and unwelcome touching, a behavior she had observed him engaging in with other female co-workers. There was no lapse in time between his actions and her response. Plaintiff did not wait hours or even minutes to respond to his actions. It was immediate. Plaintiff's response was unequivocal and viewed in context could only have communicated opposition to sexually harassing behavior. Therefore a reasonable jury could logically have concluded that Plaintiff was engaged in protected activity of which Habkirk had to be aware.

For this reason, *Mitan v Neuman Marcus,* 240 Mich App 679 (2000) cited by the Defendant is inapposite. In that case, the plaintiff complained about job discrimination which she did not attribute to a protected category but only to her supervisor's refusal to allow her to participate in a

sales promotion. A second complaint alleged job harassment because she would not credit plaintiff with some sales and called her a liar. *Mitan* never raised a claim which was in any way connected to the Handicapper's Act. Thus her communications could not have been understood to be opposition to handicap discrimination. In this case, Garg's response was directly responsive to perceived sexually harassing behavior. There could have been no doubt in Habkirk's mind that what Garg was telling him, albeit nonverbally, was that she opposed his sexual misconduct.

Defendant was aware of the protected activity as Habkirk himself was in effect the Defendant given his high position in the organizational structure. In 1983, he was program director of the LCC. Then in 1990, he was promoted to Director of the entire organization with ultimate authority for approving promotion and transfer decisions. Throughout Plaintiff's employment, Habkirk remained in a supervisory role over Plaintiff. Thus knowledge by the Defendant is obvious on this record.

Through the self-serving denials of its supervisors, Defendant claims it had no knowledge of Plaintiff's protected activity. Since Habkirk was on the receiving end of the protected activity, there is no doubt that he had the requisite knowledge. An employer cannot prevail by simply denying knowledge of protected activity. In *Dey v Colt Construction & Development Co.,* 28 F3d 1446 (7th Cir 1994) plaintiff alleged that she was terminated by the company president in retaliation for her complaints of sexual harassment. The defendant challenged plaintiff's claim because the decision-maker was not aware of the complaint by plaintiff. All defendant's witnesses denied that the president had knowledge or was told of the plaintiff's complaints. After the trial court granted summary judgment, the Seventh Circuit reversed finding relevant that the harasser who did have knowledge of the harassment complaints participated in the decision even if the final decision was the president's alone. This was sufficient to defeat summary judgment. In this case, Habkirk not only

participated; "the buck stopped with him" with regard to promotion decisions. (Tr 1291, Apx 162b). Thus his knowledge was a sufficient basis for the jury to found for plaintiff.

Only general corporate knowledge of the protected activity is required. *Gordon v New York City Bd of Education*, 232 F 3d 111, 117 (2nd Cir 2000). See also *Alston v NYC Transit Authority,* 14 F Supp 2d 308, 311 (SD NY 1998), in which the court held that "plaintiff need not show that individual decision-makers with the [Defendant] knew that she had filed EEOC complaints" to establish a prima facie case of retaliation as long as there is some general corporate knowledge which certainly existed in this case. An individual's denial of notice or purported ignorance can not be used to obfuscate the corporation's knowledge of the protected activity.

The jury also reasonably made the causal connection between the protected activity and the subsequent adverse employment decisions. The following proofs offer ample support for the causal link and the jury's verdict for the Plaintiff: (1) Habkirk became cold to Ms. Garg after the slugging incident; 2) Habkirk directly participated in Plaintiff's interviews for at least two positions which she was denied; 3) Habkirk was notified of Plaintiff's applications for other promotional positions; 4) Habkirk was head of the organization for the positions which Plaintiff was denied; 5) Garg was qualified for the positions she sought; 6) lesser qualified employees were hired for both promotional and lateral transfer positions instead of Plaintiff; 7) the Gargs were told by Slaine that Plaintiff was not being promoted because Habkirk did not like her; 8) there was no evidence of any other basis for Habkirk's dislike of the plaintiff and 9) there was no performance , education, credentialing, or experience based reason for the continuing denial of promotions and hostile environment to which she was subjected.

Based on this ample evidence, the jury reasonably found for Plaintiff. That verdict was

affirmed by the trial court which observed:

> Considering that plaintiff presented considerable evidence of many promotions denied where plaintiff was qualified for such positions and lesser qualified persons were hired, reasonable minds could conclude that Donald Habkirk used his position of authority to retaliate against plaintiff for her opposition to his perceive act of sexual harassment.

Opinion & Order dated 11/3/99, p 7, Apx 11a).

Not surprisingly, Defendant disagrees with this result and attacks some of the pieces of evidence supporting Plaintiff's claim. First Defendant bemoans the lack of direct evidence. However, it is the rare case in which an employer will admit to a retaliatory motive. For that reason, direct evidence is not required. *International Brotherhood of Teamsters v United States,* 431 US 324, 358, n 44 (1977); *McLemore v Detroit Receiving Hospital,* 196 Mich App 391, 396(1992).

Cases relied on by Defendant are markedly different and therefore not applicable. In *Feick v County of Monroe,* 229 Mich App 335 (1998) the court of appeals affirmed a trial court's grant of summary disposition in a retaliation case. Feick had been terminated and not reappointed when a new prosecutor was elected. The plaintiff alleged that the decision was motivated in part by retaliation for her filing of an EEOC charge. However, the only evidence she could muster in support of the claim was a statement in deposition that the prosecutor was not happy about the EEOC changed and had talked about it to one other person.

The complete lack of evidence at the summary disposition stage in *Feick* is far different than the evidence introduced during the trial of this case cited above which established that Habkirk displayed a sudden, unwarranted change in attitude toward Plaintiff and then participated in decisions regarding a long list of promotions which plaintiff was denied despite her qualifications.

Although there was no direct evidence from Habkirk's mouth of his retaliatory animus, Plaintiff did introduce the admission of Mr. Slaine,[20] another supervisor of Defendant, who indicated Habkirk's intent to deny Plaintiff promotions because he did not like her. Defendant asserts that there is no evidence to support an inference Habkirk disliked her because of the protected activity. The record contains no other explanation for Habkirk's attitude toward Plaintiff. She was an excellent performer with a clean work record. Thus it was a reasonable inference for the jury to conclude that Habkirk disliked Plaintiff and denied her promotions because of her protected activity.

Maynard v City of San Jose 37 F3d 1396 (9th Cir 1994), also cited by Defendant, is distinguishable since the defendant presented an alternative, non-retaliatory reason for the defendant's anger toward plaintiff. Here Defendant has not offered any legitimate, non-retaliatory explanation for Habkirk's attitude toward plaintiff.

As a last resort, Defendant argues that the time interval between the protected activity and the denials of promotions and creation of a hostile workplace was too long to for a causal connection to exist. Defendant focuses only on the promotion that Plaintiff sought in 1983 and ignores the immediate change in Habkirk's behavior toward Plaintiff. In fact, the retaliation started immediately.

Even if there was a two year lapse between protected activity and adverse action, that is not fatal to Plaintiff's claim. Since this was the first promotion posted after the protested activity, this was the first opportunity for Habkirk to act and he did. Temporal proximity must be considered in the context of each case. Even a three year gap between protected activity and plaintiff's non-selection was not fatal in *Hayes v Shalala*,902 F Supp 259 (D DC 1995) because that was the first

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[20] Contrary to Defendant's statement, this was not Slaine's opinion but an admission by Habkirk made to Slaine.

time the Plaintiff was vulnerable to retaliation. See also *Enright v Illinois State Police*,19 F Supp 2d 884 (ND Ill 1998) (interval of more than two years between protected activity and adverse action did not defeat claim because it "could just as easily indicate that defendant did not have an opportunity to retaliate and then did so upon first opportunity)

Defendant has cited many cases which held that a particular time interval between protected activity and adverse action negates an inference of retaliation. In those cases, the plaintiff was relying on temporal proximity alone to establish the causal connection.

A causal connection can be established in many different ways. No single factor is dispositive. *Nguyen v City of Cleveland,* 229 F 3d 559, 563 (6th Cir 2000). Rather the proper focus is on the totality of circumstances. It is "causation, not temporal proximity or evidence of antagonism that is an element of plaintiff's prima facie case, and temporal proximity or antagonism merely provide an evidentiary basis from which an inference of causation can be drawn." *Farrell v Planters Lifesavers Co.,* 206 F3d 271(3rd Cir 2000). "This necessarily involves an inquiry into the motives of the employer, which is highly context specific." *Hargrave v County of Atlantic,* 262 F Supp 2d 393 (D NJ 2003).

In *Shirley v Chrysler First, Inc.,* 970 F2d 39 (5th Cir 1992) Chrysler argued that the passage of 14 months should be legally conclusive proof against retaliation. The Fifth Circuit disagreed:

> Consideration of such dates is part of our analysis, but not in itself conclusive of our determination of retaliation... We see no reason to adopt Chrysler's position and expand the requirements for establishing a prima facie case of retaliation. The district court properly weighed the lapse of time as one of the elements in the entire calculation of whether *Shirley* had shown a causal connection between the protected activity and the subsequent firing. *Id* at 43-4

Similarly, in *Robinson v Southeastern Pennsylvania Transportation Authority,* 982 F2d 892 (3rd Cir

1993)defendant argued that events occurring in early 1984 were too remote from plaintiff's December 1995 dismissal to be considered a cause of his termination. The Third Circuit held:

> Although almost two years passed between these events and Robinson's termination from employment, we cannot say the trial judge was clearly erroneous in including these events in his determination that retaliation occurred. The mere passage of time is not legally conclusive proof against retaliation... We find substantial support for the trial judge's conclusion that Robinson's termination had its roots in these earlier confrontations over race. *Id* at 894-5.

Therefore temporal proximity is a possible factor but not the sole factor to consider in determining whether retaliation has occurred.

In this case, the evidence of retaliation begins with Habkirk's coldness toward Plaintiff after the slugging incident and unfolds over time to encompass a continuing series of denied promotions. Rather than negate an inference of retaliation, the time interval in this case butresses Plaintiff's claim that Habkirk never forgot the incident in which Plaintiff opposed his sexual harassment.

B. Retaliation based on opposition to discrimination on the basis of national origin and color.

The evidence introduced at trial also provided a basis on which reasonable jurors could and did in fact find that Plaintiff was retaliated against for opposing discrimination against her on the basis of her national origin and color. Specifically, the proofs reflect that Ms. Garg filed a grievance asserting that she was denied promotions based on her national origin or color. That grievance went to Cathcart at the first step and then to Habkirk. In August 1994, Plaintiff also wrote to Habkirk, requesting an investigation into why she had not been promoted. Then in October 1994, Plaintiff's attorney wrote to Defendant stating that she had been retained to represent Plaintiff in connection with a possible discrimination suit.

The proofs further reflect that between the 1987 grievance and trial, Plaintiff was denied seven more promotions, denied committee memberships, denied a key to the office building despite the fact the door was often locked when she arrived, berated for conduct which was condoned when done by other employees, issued unwarranted performance memos (including four in one day), and relegated to a former storage room as an office from which disgusting noises could be heard emanating from the adjacent bathroom.

During the majority of this time, Ms. Garg worked under Cathcart; during the entire time period, Habkirk remained defendant's director and head of the entire organization. The buck stopped with Habkirk. (Tr 1291, Apx162b). Certainly, therefore, Cathcart and Habkirk knew Ms. Garg had engaged in protected activity by complaining of national origin discrimination as the grievance went to both of them. Cathcart was directly involved in at least two of Plaintiff's post grievance attempts to be promoted, was responsible for denying Ms. Garg's application for credentials, and was a significant member of the chain of command. He also admitted to Carmine Palmieri, the union steward, that his promotional criteria were subjective and personal and he had the right to promote whoever he desired. (Tr 887-8, Apx 150-1b).

Habkirk remained Defendant's director during this entire time and acknowledged that he had the final say with regard to promotions. Plaintiff's August 1994 letter, seeking an explanation for the denial of promotions was sent directly to him Thus to argue that the decision-makers had no knowledge of Plaintiff's discrimination complaint is disingenuous at best. Reasonable jurors could easily have concluded that Ms. Garg would never receive a promotion if Cathcart and Habkirk did not want to her to be promoted and that one reason that they blocked her efforts was he opposition to national origin/color discrimination.

The record also contains sufficient evidence to substantiate the jury's finding that a causal connection existed between the Plaintiff's protected activity and the Defendant's retaliatory mistreatment of Plaintiff through the continued denial of promotions and the creation of a hostile work environment. This evidence, as identified by the court of appeals in affirming the verdict include :1) plaintiff failed to receive the next promotion after filing her grievance; 2) Plaintiff was qualified for the promotion posted in December 1988; 3) Plaintiff failed to receive an additional seven promotions between 1989 and 1997 despite her qualifications for the positions; 4) individuals less qualified than Plaintiff received the promotions; 6) in 1995 Plaintiff was placed in a storage room without carpet and windows from which she could hear noises emanating from the adjacent bathroom when there were appropriate offices available and given to contract employees and others with less seniority; 7) Cathcart had made disparaging statements about minorities including African Americans and Indians; 8) Plaintiff was reprimanded and berated for minor infractions while her co-workers received better treatment; 9) Plaintiff was treated less favorably than her co-workers with regard to work rules and 10) Cathcart and Habkirk were in Plaintiff's chain of command during this time. Despite this evidence, Defendant takes exception to the decisions of the trial court and Court of Appeals affirming the verdict. Since the verdict was supported by sufficient evidence, the Defendant's arguments are without merit.

Defendant contends that Ms. Garg was not treated any worse after filing her grievance than she had been treated previously and therefore she is unable to establish the causal connection between the grievance and any adverse employment action. Defendant's premise is incorrect however as the micro-management, office assignment and disparate treatment occurred after, not before, the grievance. While defendant claims that Plaintiff testified that the scrutiny and disparate

treatment did not commence until 1992, that was not the testimony. Those dates were simply the times for which Plaintiff had notes. She testified to harassing treatment dating back to 1988 when she was denied credentials and appointment to committees. As the Circuit court found, "a jury could reasonably conclude plaintiff's supervisors intended to deny any promotions to plaintiff and make plaintiff's life miserable because she filed a grievance." (Opinion and Order dated 11/3/99, p 9, Apx,262a).

If Defendant's treatment of Ms. Garg was in retaliation for "opposing a violation of Elliot-Larsen, it cannot be allowed to escape liability by making it impossible to prove which of multiple instances of opposition provoked the retaliatory treatment. Applying this principle, the Sixth Circuit concluded that plaintiff's discharge was in retaliation for several actions he took in opposing discrimination against women and minorities and for filing a claim with the EEOC without attempting to dissect which opposition activity caused which retaliatory act. *Johnson v University of Cincinnati,* 215 F3d 561, 580-583 (6th Cir 2000).

In addition, evidence that Cathcart had expressed bias against people of color, both African-Americans and Indians, supported a finding of retaliation against Plaintiff for asserting a claim of national origin/color discrimination. Defendant attempts to dismiss any evidentiary value of Cathcart's statement by calling them "stray remarks." These, however, were not stray remarks. The comments were made by Cathcart, a decision-maker and someone with the authority to influence the promotion decision. *Ercegovich v Goodyear Tire & Rubber Co.,* 154 F 3d 344, 355 (6th Cir 1998). The comments were not ambiguous and clearly express a discriminatory bias. Nor is Plaintiff relying on a single isolated comment. The comments reflect a pattern. Cathcart felt comfortable enough about his bias to express it several times, to several different people in the workplace.

Comments evidencing such hostility made during the time of the adverse decisions, athough no directly related to the decisions, was properly considered by the jury. *Cooley v Carmike Cinemas 25,* F3d 1325, 1330 (6th Cir 1994).

The defendant again claims that the lapse in time between the protected activities and the adverse actions requires a rejection of Plaintiff's claims. However, the passage of time is not the sole factor in determining causal connection and is not dispositive of a retaliation claim. Thus this case is distinguishable from *Clark County School District v Breeden,* 121 S Ct 1508 (2001) in which the Supreme Court held that if relying only on temporal proximity, it must be "very close." The Court also rejected that retaliation claim in *Breeden* because the adverse decision had been announced before the Plaintiff engaged in protected activity. Thus there was no causal connection.

A lapse in time between protected activity and adverse action is not fatal if there is other evidence demonstrating a causal connection. A demonstration that "a pattern of retaliatory conduct [began] soon after plaintiff filed discrimination charges" is sufficient proof of a causal connection. *Jackson v RKO Bottlers of Toledo*, 743 F2d 370, 377 n4 (6th Cir 1984). Here such a pattern began and continued through trial. Defendant denied plaintiff the next promotion for which she applied after the filing of the grievance, commenced a campaign of harassment through intense scrutiny, unwarranted criticisms, and additional denials of promotion. Courts have also recognized that an inference of retaliation may be gleaned from a showing that the plaintiff was subjected to an atmosphere where the were scrutinized more carefully than similarly situated employees who hand not engaged in protected activity. *Harrison v Metropolitan Government of Nashville and Davidson County Tennessee*, 80 F3d 1107, 1119 (6th Cir 1996). Despite a lapse in time, causation can still be based on timing when the employer retaliates at the first available opportunity. *McGuire v City of*

Springfield, 280 F3d 794, 796 (7th Cir 2002).

Defendant relies heavily on *West v General Motors Corp.*, 469 Mich 177 (2003) to support its position that Plaintiff did not introduce evidence of a prima facie case of retaliation. This Court's decision in *West*, however, is inapplicable because of the vast difference in proofs presented by the plaintiffs. In *West, supra*, the plaintiff was unable to establish the causal connection between the protected activity and the adverse action. The only evidence he could muster was the temporal proximity between the two events. On the other hand, Ms. Garg proved at trial that the continuous denials of her promotion and transfer applications were influenced by her protected activity.

Further distinctions exist between this case and *West*. In *West*, the plaintiff's discharge occurred seven months after he called the police to report an assault by his coworker. However, after filing the police report, *West* misrepresented the hours that he worked, a violation for which he had already been disciplined. This overcharging triggered an investigation, resulting in plaintiff's termination. Plaintiff's record is quite the opposite. She had an exemplary work record and was never disciplined. Yet Ms. Garg's performance was downgraded prior to the posting of the first promotion for which she applied. Moreover, evidence was introduced that defendant made promotional decisions subjectively and waived job qualifications for some individuals and imposed higher standards for Plaintiff.

In addition, West's supervisors reacted nonchalantly to his police report, while Ms. Garg's supervisor's reacted immediately and negatively to her protected activity by becoming cold to her and telling other managers that she would not be promoted because he did not like her. Finally, the supervisors in *West* were not involved in the discharge decision and the individuals who conducted the investigation were unaware of the police report. In this case Habkirk remained her superior

throughout her employment, received copies of her applications, interviewed her several times, and had final approval of all promotion decisions. Thus unlike *West*, Plaintiff introduced sufficient evidence of a causal connection for the jury to properly return a verdict for her.

This case is more similar to *Henry v Detroit,* 234 Mich App 405 (1999) which was cited with approval by this Court in *West, supra*. In *Henry*, the plaintiff was terminated for providing testimony at deposition which was adverse to his employer. After his termination, Henry brought a Whistleblower's Protection Act, MCL 15.361 et seq. The defendant argued that Henry could not establish the causal connection between his protected activity and the termination. The court found that the causal connection was satisfied by evidence that prior to his deposition testimony, plaintiff had never been reprimanded and had never been subject to any negative employment action. Following his testimony, *Henry* was told that the police chief was upset; the chief began to treat him differently, and then he was forced to choose between a demotion or retirement. Defendant offered performance based reasons for the adverse action. The court concluded that a determination of whether performance or protected activity motivated the defendant "was a question properly left to the jury." *Henry, supra* at 414.

Similarly, plaintiff was treated differently after her protected activities. Like Henry, plaintiff had an exemplary work record before her opposition to discrimination. She had a cordial working relationship with Donald Habkirk. Afterwards, Habkirk became cold to Plaintiff. She was told that she was not being promoted because Habkirk did not like her. Plaintiff's performance was downgraded for the first time. Defendant micro-managed her and criticized her performance for behaviors found acceptable in other employees. She was forced to work and meet clients in a windowless storage room adjacent to a bathroom from which disgusting noises were heard. In

addition, she was denied promotions which were given to less qualified individuals. Although Defendant offered justifications for these actions, the determination of whether it was performance or retaliation that led to Defendant's actions was properly left to the jury. The jury, after weighing all the evidence, could have reasonably concluded that Habkirk stonewalled Plaintiff's career because she had the temerity to oppose his sexual harassment and/or that Habkirk and Cathcart retaliated against her because she had the courage to file a grievance alleging discrimination. Thus there is no basis for reversing that verdict.

II. EVEN, ASSUMING ARGUENDO, THAT THIS COURT FINDS THAT ONE OF THE TWO INSTANCES OF RETALIATION, EITHER OPPOSITION TO SEXUAL HARASSMENT OR A COMPLAINT OF DISCRIMINATION, WAS NOT SUPPORTED BY THE PROOFS, A NEW TRIAL IS NOT REQUIRED.

Defendant has asserted that it is entitled to a new trial if either "theory" of retaliation is found to have been improperly submitted to the jury. However, that relief is not justified in this case. As set forth in earlier argument in this brief, to the extent that Plaintiff presented two "theories of retaliation, she established a prima facie case as to both.

Although Defendant attempts to divide the Plaintiff's protected activities on which her retaliation claim was premised into separate theories of liability, the proofs which resulted in the verdict presented only one theory of retaliation liability under §701 of the Elliott-Larsen Civil Rights Act, MCL 37.2701. Plaintiff asserted only a single count of retaliation, premised on a series of protected activities and subsequent adverse actions. A count in a complaint covers a distinct and single cause of action. In this case, Plaintiff's complaint alleged a single count of retaliation. Thus if this court finds sufficient evidence to sustain the jury's verdict of retaliation either due to Plaintiff's opposition to sexual harassment or filing a complaint of discrimination, there is no basis

for a new trial.

While Ms. Garg's opposition occurred more than once and occurred at different times, the jury reasonably concluded that defendant retaliated against Plaintiff for doing so. *Johnson v University of Cincinnati*, 215 F3d 561 (6th Cir 2000). In that case, the Sixth Circuit had no difficulty concluding that plaintiff's discharge was in retaliation for several actions he took in opposing discrimination against women and minorities and for filing a claim with the Equal Employment Opportunity Commission. *Id* at 580-3.

This case is much like *Stanisz v Federal Express Corp.*, 2003 WL 21660885 (Mich App 2003) in which Plaintiff's retaliation claim was based on more than one protected activity. She complained about discriminatory treatment and a hostile environment to her supervisors. Later, after she had been suspended, Stanisz also filed an internal EEO complaint. Following that complaint, she was demoted and then terminated. A jury verdict form that submitted only a single question on retaliation was found proper and the request for a new trial was denied.

This case was submitted to the jury on only two distinct theories of liability - discrimination and retaliation. The special verdict required separate findings as to each theory of liability. Based on those findings the court awarded damages. The manner in which the case was submitted to the jury makes it possible to separate the bases of liability with respect to damages. The jury awarded damages only for retaliation. Thus there is no reason to require a new trial based on any flaw in the verdict form.

The failure to include specific questions regarding each protected activity pled by the Plaintiff in the verdict form was not improper and does not require a new trial. In *Zdrojewski v Murphy,* 254 Mich App 50 (2003) the Court of Appeals considered whether a new trial was required when a

general verdict was returned in a case in which one theory of negligence was improperly submitted to the jury. In *Zdrojewski*, the plaintiff presented three alternate theories of negligence. The jury returned a general verdict finding that the defendants were negligent and that plaintiff's injury were caused by the negligence. No specific findings were made as to how defendants were negligent or how the negligence caused plaintiff's injuries. The Court of Appeals concluded that sufficient evidence existed from which the jury could have concluded that defendants were negligent on the alternate theories which had been properly submitted to the jury. Moreover, the Court of Appeals found that a new trial was not warranted because the defendants had failed to object to the lack of detail in the verdict form.

In its brief, Defendant suggests that the *Zdrojewski* decision has no applicability to this case because unlike the defendant there, it requested a special verdict form which included separate questions for each protected activity alleged by the Plaintiff. The form, however, was presented as part of its proposed jury instructions. Once the court revised the special verdict form, Defendant never objected to the portion of the form that dealt with Plaintiff's retaliation claim. Defendant simply requested that the court revise the verdict form to include "a breakdown here between economic damages and emotional damages and past and future." (Tr 4/22, pp10-13, Apx 163-66b). When the court refused to modify the verdict form, Defendant's attorney stated: "for the record, I would object that we don't have the breakdowns." (Tr 4/22, p 12, Apx 165b). No objection was lodged or preserved to regard to the jury question regarding the retaliation claim.[21] Thus, like the

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[21]The only regret expressed by the Court regarding the verdict form was that it did not require the jury to delineate between past and future damages. The Defendant did not object and the trial court did not express any regret regarding the portion of the jury instructions or verdict form that dealt with the retaliation claim (Apx 250a).

defendant in *Zdrojewski*,[22] Defendant here has waived its right to object to the verdict form.

Even if the trial court committed error in the formulation of the special verdict form, Defendant's failure to object to the verdict form or the jury instruction that "plaintiff must prove by a preponderance of the evidence that she opposed violation of the Elliott-Larsen Act or participated in activities protected by the Act" which the court prepared and presented to the parties prior to instructing the jury precludes the relief sought in this forum. (Tr 4/22, p. 127, Apx 167b) Following the close of evidence, the court presented the parties with a draft of the special verdict form that he intended to submit to the jury. The form contained several questions for the jury to consider and answer. Specifically, the jury was asked to decide whether Defendant had discriminated against Plaintiff on the basis of her color/national origin, and whether Defendant retaliated against Plaintiff because she opposed sexual harassment or filed a charge or complaint of discrimination. If the jury answered either of those questions in the affirmative, the jury was instructed to determine the amount of damages suffered by the Plaintiff as a result of the retaliation and/or discrimination. (Apx 247a).

In discussions regarding the jury verdict form, Defendant expressed concern that the special verdict form did not break down damages into economic and emotional awards and past and future damages.(Tr 4/22, pp 10-3, Apx 164-66b) The Defendant, however, did not object to the phrasing of the question regarding retaliation. The form was then submitted to jury.

After deliberations, the jury returned a verdict for the Plaintiff only on the retaliation count. The jury awarded damages of $250,000.00 for Plaintiff. Defendant appealed the verdict but never mentioned any flaw in the verdict form. The Defendant's failure to object to the verdict form

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[22] The cases cited by defendant are not applicable. No objections were properly preserved in those cases.

precludes any consideration of this issue in this forum. Thus a new trial is not required if the Court finds that sufficient evidence exists to support Plaintiff's claim that she was retaliated against due either to her opposition to sexual harassment or filing a complaint of discrimination.

MCR 2.516(C) provides that a party may only assign as error the failure to give an instruction if the party objects on the record before the jury retires to consider the verdict, stating specifically the matter to which the party objects and the grounds for the objection. In addition, when a special verdict form is used, the court settles the form of the verdict in advance of the argument and in the absence of the jury. MCR 2.514. Failure to raise an objection before the jury retires also constitutes a waiver of the objection. MCR 2.514(c).The timing of the objection is important because it allows the trial judge an opportunity to correct any potential error, thereby eliminating the necessity for a retrial of the action.

An objection to the entire verdict form is not sufficient to preserve the issue on appeal. *Hammack v Lutheran Social Services*, 211 Mich App 1, 10 (1995). The Defendant must have specifically objected to the failure of the special verdict form to separate the Plaintiff's retaliation claim into two questions with individual inquiries for each protected activity. Thus in *Bouverette v Westinghouse Electric Corp.*, 245 Mich App 391 (2001), the defendant objected to the instructions at trial because they did not follow the applicable law. Then on appeal the defendant argued that the instructions were slanted because it accepted as true facts which were in dispute. The court concluded that the appeal was not preserved because the objection asserted on appeal had not been specifically raised at trial. Here Defendant's objection to the provision in the verdict form regarding damages was not sufficient to support a challenge to the question regarding retaliation.

The Defendant has waived any error with regard to the jury instructions. Issues for appeal

must be preserved in the record by objection. "Counsel may not harbor error as an appellate parachute." *People v Pollick,* 448 Mich 376, 387 (1995) cited in *People v Riley,* 465 Mich 442, 448 (2001). A party who waives rights may not then seek appellate review of the claimed deprivation of those rights because the waiver extinguishes the error. As this court explained in *People v Riley,* 465 Mich 442, 449 (2001) "when a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal." Here Defendant did not object to the question in the special verdict form regarding retaliation which combined both protected activities into a single inquiry. The court specifically solicited comments and objections from the parties about the jury verdict form. Defendant only objected to the part of the form that dealt with damages. Defendant cannot now benefit from remaining silent at the time. *Phinney v Perlmutter,* 222 Mich App 513 (1997). Thus all other objections were waived. See also *Stanisz, supra* in which the defendant waived review of any issue regarding the failure of the verdict form to apportion damages by stating that it had no objection to the jury instructions and special verdict form.

The verdict form used by the trial court was proper. However, assuming arguendo, that the failure to include each protected activity alleged by plaintiff in a separate question in the verdict form was in error, defendant failed to object. Therefore, there is no basis for a new trial.

III. NONE OF PLAINTIFF'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The Defendant has also argued that it is entitled to a new trial because the "vast majority" of plaintiff's claims are barred by the statute of limitations. In actuality, none of Plaintiff's claims are barred.

Under MCL § 600.5805(9), an action for discrimination must be brought within three years

after the cause accrues. *Mair v Consumers Power,* 419 Mich 74, 77-8(1984). A claim accrues when the wrong upon which the claim is based was done. MCL 600.5827. The wrong is done when the plaintiff is harmed rather than when the defendant acted. *Stephens v Dixon,* 449 Mich 531 (1995). Thus, in termination cases, the wrong is done and the action accrues on the day of the discharge , not when the employee receives notice of the termination. *Collins v Comerica Bank,* 468 Mich 628 (2003). In this case the complaint was filed on July 21, 1995. Thus, all acts which caused harm to Plaintiff after July 21, 1992 are properly included in this case.

Commencing in 1983 and continuing long after July 21, 1995 and, in fact even after the complaint was filed, Plaintiff was denied promotions and lateral transfers for which she was more qualified than the selected candidate.

Plaintiff suffered harm after July 21, 1992 from the Defendant's retaliatory conduct which included a pattern of denied promotions and hostile treatment. The retaliation unfolded over a period of years beginning with Habkirk's coldness toward Plaintiff and continuing over time to encompass actions designed to humiliate and denigrated the Plaintiff.

In addition, Ms. Garg was subjected to a hostile environment commencing after she filed a grievance alleging national origin discrimination. The harassment intensified after Plaintiff sent a letter demanding an explanation for the promotion denials and counsel sent a letter regarding a potential discrimination case in 1994. Plaintiff was singled out for public humiliation when the employees were together to leave for the day or going to lunch, forced to stand outside the office until someone with a key arrived to let her in the building, denied the right to sit on committees and attend conferences, berated for eating at her desk or taking a short break to go outside while the other employees were all allowed to engage in such behavior and insulted at case presentation through

personal attacks or being ignored. Despite her seniority and the availability of other offices, she was assigned to a windowless, carpetless storage room which was adjacent to bathroom from which exploding bowel sounds could be heard. These actions which commenced in 1983 but extended well beyond 1992 caused Plaintiff harm for which the jury properly found Defendant liable. Thus the claims of retaliation for which Plaintiff suffered harm were not time barred.

The Plaintiff's claims are timely even without reference to the continuing violation doctrine. However, there is no reason to abrogate the continuing violation doctrine generally or this Court's decision in *Sumner v The Goodyear Tire & Rubber Co*, 427 Mich 505 (1986).[23] *Sumner* is a longstanding tenet of Michigan jurisprudence established by this Court in 1986. The purposes underlying the continuing violation doctrine are still valid today and include: 1) Title VII and Elliott-Larsen are remedial statutes whose purpose is to root out discrimination and make injured parties whole; 2) employees are generally lay people who do not know that they must act quickly or risk losing their cause of action, may delay filing complaints in the hope of an internal resolution or give the employer a second or third chance; and 3) many discriminatory acts occur in a manner that is difficult to precisely define when they took place, because "they unfold, rather than occur." *Id* at 525-6.

The Court of Appeals applied the "series of events" or "continuing course of conduct" sub-theory to this case. Pursuant to this theory, where an employee challenges a series of allegedly discriminatory events which are sufficiently related so as to constitute a pattern, only one of which

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[23]The Defendant has mistakenly compared the continuing violation doctrine to tolling or the discovery rule. The *Sumner* court made it clear that these concepts are conceptually different. Tolling and the discovery rule extend the limitations period when a plaintiff is prevented by the employer or circumstances from making a timely filing.

occurred within the limitations period, defendant is liable for the entire series of events. *Sumner, supra* at 528. In *Sumner*, the plaintiff who was African-American experienced a continuous course of racial harassment by his supervisor despite complaints to union officials. The harassment eventually led to an altercation which resulted in *Sumner*'s termination. *Id* at 513-4. While the discharge was within the limitations period, the harassment was not.

To determine whether a continuing course of conduct exists, this Court set forth several factors to be considered.

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g. a biweekly paycheck) or more in the nature of an isolated assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate. *Sumner* at 538.

In this case, the Defendant's action's involved the same subject matter: retaliation for opposition to Elliott-Larsen violations by repeated denials of promotions, compounded by micro-management and disparate treatment by supervisors following the 1987 grievance and the 1994 communications to Habkirk. The retaliatory acts were not sporadic, isolated or random. They occurred frequently and regularly: denial of all 18 promotions sought by Plaintiff over 15 years, almost constant harassment by Cathcart after the 1987 grievance was filed, and similar treatment by her new supervisor, Miller, after the 1994 letter to Miller's boss, Habkirk. Additionally, like harassment, the nature of retaliation is that it ceases once the intent to retaliate ends; it does not provide notice of subsequent neutrally initiated injuries. *Sumner, supra* at 538-9. Here the jury may

reasonably have concluded that retaliatory animus of Cathcart and Habkirk would not cease until Garg quit her job or won her lawsuit.

Similarly in *Meek v Michigan Bell,* 193 Mich App 340 (1991) the court applied the continuing violation doctrine to find that allegations of gender and religious discrimination spanning from 1987 through 1994 were all actionable. *Meek* analyzed the third factor in the *Sumner* analysis, which questions whether the conduct of the employer has the degree of permanence which should trigger an employer's awareness that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate The *Meek* court found the Defendant's actions did not have the degree of permanence that would have required Plaintiff to assert her rights earlier. The court did not want to punish plaintiff for not rushing to court before she was reasonably certain that the discrimination against her would not cease and would continue with each transfer and new supervisor, i.e that it was a permanent condition from which the court could say that the cause of action finally accrued.

In this case, Plaintiff, like Meek, was hopeful that the situation would resolve itself. She sought internal, informal remedies of filing a grievance alleging discrimination and wrote letters to Habkirk and Defendant's Board. She maintained hope and reasonably believed that her concerns could be resolved through this mechanisms. She did not rush to the court house, a behavior which should be rewarded not punished, until she was convinced that the situation was permanent and the harassment and denial of promotions would not end without litigation. She then commenced this case.

Not every action which offends an employee and is the subject of an informal complaint or grievance is sufficient to maintain a civil discrimination action. Otherwise the Courts would be faced

with an overload of premature lawsuit with minimal damages. Federal and state employment discrimination law encourage informal resolution. Both provide a mechanism for filing a charge and allowing the agencies to attempt conciliation and resolution short of litigation. An adverse action is required to support a retaliation claims. Courts have repeatedly reiterated that actions which are simply "petty slights or trivial annoyances" which cause "bruised egos" are not sufficient basis to bring an action. *White v Burlington Northern & Sante Fe Railroad Co.*, 364 F 3d 789, 799 (6th Cir 2004). Employees are expected to stay on the job while seeking redress. *Perry v Harris Chernin,* 126 F3d 1010, 1015 (7th Cir 1997). Every discrete act is not an adverse action. It is the cumulative effect of petty minor annoyances which create an actionable adverse action which harms the Plaintiff. Initially Plaintiff may recognize that a decision was unfair but not until later when a pattern develops does the employee recognize that another motivation, such as retaliation, was the cause of the mistreatment. Thus the statute of limitations should not begin to run until it is clear that the discrimination or retaliation has reached the level of permanence which would trigger Plaintiff's obligation to file suit. That is what occurred in this case.

To deny Plaintiff the benefit of the continuing violation theory would be to punish her and other potential litigants who make every effort to avoid litigation and give employers every opportunity to do the right thing by resolving the issues without protracted and expensive litigation. If Defendant had responded to Plaintiff's concerns and started treating her fairly with regard to promotions and her work environment even as late as 1994 or early 1995, there would have been no lawsuit. Plaintiff's attempts to resolve her concerns short of litigation should be encouraged, not penalized.

Sumner is wholly consistent with the purpose behind the limitations statutes. In general,

limitations periods are intended to guard against stale claims. They protect defendants and courts from having to deal with cases which are seriously impaired by the loss of evidence and penalize plaintiffs who are not industrious in pursuing their claims. *Lothian v City of Detroit* 414 Mich 160, 166-7(1982). Courts have held that statutes of limitations should be fairly construed to advance these policies and not as a sword to defeat legitimate claims. *Herrick v Taylor* 113 Mich App 370, 374 (1982). In this case, the claims were not stale and Defendant had no difficulty defending each promotion decision. It produced documentation and propounded legitimate non-discriminatory explanations through documents and witness testimony. Thus, there exists there is no reason to bar these claims.

Defendant suggests that the continuing violation doctrine of *Sumner* should be replaced by the rule enunciated by the *United States Supreme Court in National Railroad Passenger Corp v Morgan,* 536 US 101 (2002). Overruling precedent such as *Sumner* must be undertaken with caution and only after careful consideration of the effect of stare decision. The court should consider whether the earlier decision was wrongly decided and whether overruling the decision would cause an undue hardship because of reliance interests or expectations that have arisen. *Robertson v DaimlerChrysler Corp.,* 465 Mich 732, 757 (2002). *Sumner* was not wrongly decided. Moreover, litigants have relied on the continuing violation theory as set forth in *Sumner* for almost twenty years. Undoubtedly there are cases not yet filed in which attorneys have advised employees not to file suit and try to work issue out informally. Rather than overburden the court system with cases alleging small indignities, this advice which has been consistent with *Sumner* furthers the goal of resolution without litigation.

The only explanation offered by Defendant for modifying *Sumner* is the existence of the Supreme Court's recent *Morgan* decision. However, this court has repeatedly held that Michigan is

not bound or compelled to interpret Elliott-Larsen in accordance with the federal courts interpretation of the federal civil rights acts. See e.g. *Haynie v Dept of State Police,* 468 Mich 302 (2003); *Chambers v Trettco, Inc.,* 463 Mich 297 (2000). Thus this court is not bound to adopt *Morgan.*

As this court recently observed, although Elliott-Larsen may be similar to Title VII, it need not be made identical nor must it be interpreted to mean exactly the same thing. *Haynie*, *supra* at 319-320. To adopt the principles announced in *Morgan* would represent a significant change in Michigan jurisprudence, requiring the Court to overrule *Sumner* and its progeny. There is no good reason to take that drastic step. *Sumner* is entrenched in Michigan jurisprudence and has even been cited by this Court as recently as July 2003 in *Collins, supra.* The holding of *Morgan* is not compelled by the text of Title VII or Elliott-Larsen. Nothing in Elliott-Larsen requires that the continuing violation doctrine be limited to hostile environment cases or implies that it would be inappropriate to apply the doctrine to any other continuous series of discriminatory acts such as repeated refusal to promote or transfer.

However, even if *Morgan* is adopted by this Court and applied to this case, Plaintiff's claims still are not barred by the limitations period. *Morgan* held that "a Title VII plaintiff raising claims of 'discrete discriminatory or retaliatory acts' must file his charge within the [statutory] time period, but a 'hostile work environment claim' will not be time-barred as long as 'all acts which constitute the claim are part of the same unlawful employment practice' and at least one act falls within the time period." *Morgan, supra* at 122. The *Morgan* court defined hostile environment claims as by nature involving repeated conduct and a series of separate acts that collectively constitute one unlawful practice. *Id* at 115-7. Based on the criteria established in *Morgan*, termination of

employment, failure to promote, denial of transfer, and refusal to hire can in reality be either discrete acts or part of a continuing employment practice depending on the circumstances of a particular case. *Id* at 114.

In this case, the combination of the repeated denial of promotions and transfers and the ongoing harassing conduct created a continuing hostile environment. Thus even under *Morgan*, the Plaintiff's claims were timely. Thus there is no reason to grant a new trial as all Plaintiff's claims, even those that occurred more than three years prior to filing the complaint, were timely filed. [24]

RELIEF REQUESTED

The trial court properly denied Defendant's various motion, a decision which was correctly affirmed by the Court of Appeals. Plaintiff's proofs created a prima facie case of retaliation by Defendant in violation of Elliott-Larsen. The evidence warrants a reasonable jury's verdict in favor of Plaintiff. The jury verdict form was proper and Defendant failed to object to the verdict form, thereby waiving any appeal on that issue. Finally, Plaintiff's claims are not barred by the statute of limitations. Nor has Defendant presented any legitimate justification for modifying the continuing violation doctrine as set forth in *Sumner*. Based on the authorities cited above, Plaintiff-Appellee respectfully requests that this Court affirm the judgment and deny Defendant's appeal in its entirety.

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[24]If this Court does find that *Morgan* should be adopted, it should not apply to this case. Rather the decision should only be applied prospectively due to its impact on the administration of justice. *Gladych v. New Family Homes, Inc.*, 468 Mich. 594 (2003)

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